Supreme Court, U.S.
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No. 92-1792

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

RONALD R. HELINSKI,
Petitioner,

v.

LEON A. ROSENBERG,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals of Maryland's application of the qualified privilege for out-of-court statements (made in response to questions by the media) which fairly and accurately repeated what was said moments earlier during an in-court, public proceeding raises a federal question which either can or should be reviewed by this Court under 28 U.S.C. § 1257?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Leon A. Rosenberg, respectfully requests that this Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The Opinion of the Court of Appeals of Maryland is reported at 328 Md. 664, 616 A.2d 866 (1992) and is reproduced in Petitioner's Appendix commencing at page 63A. The decision of the Court of Special Appeals of Maryland is reported at 90 Md. App. 158, 600 A.2d 882 (1992) and is reproduced in Petitioner's Appendix commencing at page 19A. The decision of the Circuit Court for Baltimore City, granting summary judgment in favor of Respondent, is reproduced in Petitioner's Appendix commencing at page 1A. References to the opinions below shall be to the appropriate page of Petitioner's Appendix and designated as "Pet. App. ——."

JURISDICTION

Contrary to the dictates of Supreme Court Rule 14, the Petition for Writ of Certiorari fails to show the statutory provision believed by Petitioner to confer on this Court jurisdiction to review the judgment in question. Petitioner presumably invokes jurisdiction under 28 U.S.C. § 1257 because he requests this Court to review the judgment of a state court. As discussed below, § 1257 does not support jurisdiction here because the judgment below is not based upon the resolution of a federal question but rather rests upon nonfederal grounds involving the application of state common law.

STATUTORY PROVISION

28 U.S.C. § 1257:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE [1]

This defamation case arises out of well-publicized child custody proceedings in the Circuit Court for Baltimore

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[1] Respondent presents his own Statement of the Case primarily because he does not believe that Petitioner's Statement of the Case fully and accurately reflects the underlying facts and the decision of the Court of Appeals of Maryland. *See* Sup. Ct. R. 15.1.

County, Maryland between Jacqueline Helinski ("Mrs. Helinski") and Petitioner Ronald R. Helinski ("Petitioner" or "Mr. Helinski") regarding Petitioner's rights of visitation with their then two-year old daughter, Jackie. Believing that Jackie had been abused sexually by Mr. Helinski, Mrs. Helinski opposed Mr. Helinski's request for unsupervised visitation. At a hearing on July 26, 1985, the circuit court entered a judgment of divorce and, as part of that decree, awarded unsupervised visitation rights to Mr. Helinski. Mrs. Helinski immediately filed a motion to amend the visitation provisions of the divorce decree. When Mrs. Helinski refused to allow Mr. Helinski to have unsupervised visitation with Jackie before resolution of her motion to amend the July 26 Order, Mr. Helinski filed a petition to have her held in contempt for failing to comply with the visitation order. A hearing was held on August 20, 1985, at which time the court "in effect, reopened the hearing of July 26 in order to reconsider the question of visitation, and thereby addressed for a second time the allegations of sexual abuse along with the new issue of contempt." Pet. App. 67A-68A.

At the August 20 hearing, Mrs. Helinski presented the testimony of Respondent Leon A. Rosenberg, Ph.D. ("Respondent" or "Dr. Rosenberg"), a child psychologist and Director of Psychological Services, Division of Child Psychiatry at Johns Hopkins University School of Medicine. Jackie's pediatrician had referred Mrs. Helinski and Jackie to Dr. Rosenberg in early August 1985 for the purpose of conducting a psychological evaluation of the child.

During the August 20 court hearing, Dr. Rosenberg testified about his findings and conclusions that the child had undergone a painful and frightening experience involving sexual abuse by her father. Dr. Rosenberg recommended to the court that Mr. Helinski's visitation rights be suspended until Mr. Helinski received psychological

examination and counseling. The court followed Dr. Rosenberg's recommendations. Pet. App. 105A.

News reporters and sketch artists from the print and electronic media were present during the August 20 hearing. They took notes and drew pictures of Dr. Rosenberg and other participants in the judicial proceeding. Following the hearing, Dr. Rosenberg left the courthouse with the presiding judge and both were approached on the courthouse steps by the reporters covering the judicial proceeding. The judge told the reporters that he could not speak about the child custody case, but told them that Dr. Rosenberg could answer their questions. Responding to questions by a television reporter, Dr. Rosenberg made three statements which, as determined by the Court of Appeals of Maryland, "accurately and fairly recounted the substance of his testimony in court." Pet. App. 114A. These statements were interspersed by the television news station throughout a news story of the hearing broadcast during that evening's newscasts. As pointed out by the Court of Appeals of Maryland, "Rosenberg insists, Helinski concedes, and we agree that the psychologist's three remarks on the courthouse steps essentially repeated what he had said earlier as a witness during the hearing itself." Pet. App. 98A. Additionally, as also stated by the Court of Appeals, "[t]he record is barren of any evidence suggesting that Dr. Rosenberg acted maliciously in evaluating Jackie and subsequently reporting his conclusions to the court and the television news team." Pet. App. 92A.

Asserting that the statements of Dr. Rosenberg broadcast on the news reports were defamatory, Mr. Helinski filed this action. After the discovery process, Dr. Rosenberg moved for summary judgment on the ground, *inter alia*, that the alleged defamatory statements were conditionally privileged and therefore not actionable because there was no evidence that Dr. Rosenberg acted with malice or with any intent to cause harm to Mr. Helinski. Finding that "no evidence [was] presented or proffered

in this proceeding that would entitle the jury to be convinced by any evidentiary standard . . . that Dr. Rosenberg, the Defendant, acted with malice or had reason to know of any falsity," Pet. App. 7A-8A, and recognizing that the alleged defamatory statements were matters of public concern which accurately recounted to the press public testimony already given in an open judicial proceeding, the circuit court granted summary judgment in favor of Dr. Rosenberg. Pet. App. 1A-18A. The Court of Special Appeals of Maryland, the state's intermediate appellate court, reversed the summary judgment. Pet. App. 19A-62A.

The Court of Appeals of Maryland granted Dr. Rosenberg's petition for writ of certiorari and reinstated the judgment of the trial court solely on the ground that Dr. Rosenberg's statements enjoyed a qualified privilege because they "conveyed a substantially fair and accurate report of the judicial hearing in which the psychologist had taken part as a witness," Pet. App. 114A, and because there was nothing in the record to suggest that Dr. Rosenberg abused the privilege recognized for such reports.[2] While the Court recognized that Dr. Rosenberg offered "three independent theories triggering a malice standard: 1) that his statements were subject to the so-called fair report privilege; 2) that his statements addressed a matter of public concern, child abuse; [and] 3) that his statements discussed a person, Mr. Helinski, so steeped in controversy as to be a public figure," the Court decided there was "no need to reach the second and third of these points." Pet. App. 82A.[3]

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[2] The Court of Appeals also held that the "self-reported statement" exception to the fair report privilege (as described in Restatement (Second) of Torts § 611 cmt. c (1977)) was inapplicable because there was "not the remotest indication in the record that Dr. Rosenberg sought in bad faith to testify at the domestic hearing with some perverse wish to harm Mr. Helinski . . . ." Pet. App. 113A.

[3] In this regard, Petitioner's Brief, at page 8, incorrectly states that the Court of Appeals agreed that the Helinski child custody

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS OF MARYLAND'S APPLICATION OF THE QUALIFIED PRIVILEGE FOR OUT-OF-COURT STATEMENTS (MADE IN RESPONSE TO QUESTIONS BY THE MEDIA) WHICH FAIRLY AND ACCURATELY REPEATED WHAT WAS SAID MOMENTS EARLIER DURING AN IN-COURT, PUBLIC PROCEEDING IS NOT A FEDERAL QUESTION AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT, OTHER STATE COURTS OF LAST RESORT OR UNITED STATES COURTS OF APPEALS

A. Absent Restriction On Free Speech Violative Of The First Amendment, The Law Of Defamation, Including The Recognition And Application of Privileges, Is A Matter Of State Common Law.

In pertinent part, 28 U.S.C. § 1257(a) provides: "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." *See also* Sup Ct. R. 10.1. In this case, the judgment below is not based upon a right, privilege or immunity specially set up or claimed under the Constitution of the United States. Rather, the sole ground for the decision of the Court of Appeals of Maryland, application of the fair report privilege, rests upon that court's interpretation of Maryland common law. Separate constitutional issues relating to Mr. Helinski's status as a public figure and to the characterization of the Helinski child custody dispute as a matter of public con-

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dispute was not a matter of public concern. Additionally, contrary to Petitioner's assertion at page 11 of his Brief, the Court of Appeals did ~~not~~ "decide" that Dr. Rosenberg acted negligently but rather merely "assume[d], without deciding, that Rosenberg acted negligently in evaluating Jackie and in communicating the results of his examination." Pet. App. 85A-86A. Similarly, the Court only assumed such negligence, if any, caused harm to Mr. Helinski. *Id.* at 86A.

cern were not decided by the Court of Appeals. Pet. App. 82A.

The tort of defamation is founded on the state interest of providing individuals a means to be compensated "for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *see also Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53, 63-64 (1966) (". . . state remedies have been designed to compensate the victim and enable him to vindicate his reputation."); *Hearst Corp. v. Hughes*, 297 Md. 112, 127, 466 A.2d 486, 493 (1983) (recognizing defamation as the tort aimed at protecting individuals' interests in their reputation); 2 Fowler V. Harper, *et al.*, *The Law of Torts* § 5.1 (2d ed. 1986). Subject to First Amendment protections in favor of free speech, state law generally determines whether a claim for defamation will lie and what elements need be proven in order for a plaintiff to recover in any given case. *See, e.g., Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir. 1992) (applying law of the state in which alleged defamation occurred).

Likewise, state law generally determines what, if any, privileges protect the publisher of statements which are alleged to be defamatory. *See, e.g., Arochem Int'l, Inc. v. Buirkle*, 968 F.2d 266, 269-71 (2d Cir. 1992); *General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1127 (6th Cir. 1990); *Johnston v. Cartwright*, 355 F.2d 32, 35-36 (8th Cir. 1966) (Blackmun, J.); *De Ronde v. Gaytime Shops, Inc.*, 239 F.2d 735, 738 (2d Cir. 1957).[4]

In Maryland, the recognition of a privilege is premised on the notion that an otherwise defamatory statement is

[4] Thus, federal courts are compelled to apply the fair report privilege if governing state law recognizes the privilege. *See, e.g., Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1434 (9th Cir. 1992) (applying Cal. law); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 254-55 (4th Cir. 1988) (applying Va. law); *Ronwin v. Shapiro*, 657 F.2d 1071, 1075-76 (9th Cir. 1981) (applying Ariz. law); *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850, 854 (8th Cir. 1979) (applying Minn. law); *see also Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 38 (1971) (pointing out that fair report privilege is recognized under Pennsylvania law).

not actionable "if publication of the utterance advances social policies of greater importance than the vindication of a plaintiff's reputational interest." *Marchesi v. Franchino*, 283 Md. 131, 135, 387 A.2d 1129, 1131 (1978); *accord Mareck v. Johns Hopkins Univ.*, 60 Md. App. 217, 224, 482 A.2d 17, 21 (1984), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985); *see generally* 2 Harper, *supra*, § 5.25 (discussing policy factors behind privileges). Following well-settled law, the Court of Appeals of Maryland determined in this case that, as a matter of Maryland law and public policy, "[t]he public's right to know the business of its courts takes precedence in this case." Pet. App. 115A.[5]

Petitioner's contention that the judgment below raises an issue under the First Amendment of the United States Constitution is incorrect. The holding of the Court of Appeals places no imposition on free speech. Indeed, recognition of the fair report privilege fosters free speech. Review of this case by this Court would be appropriate only if the fair report privilege placed "invalid restrictions on . . . constitutional freedoms of speech and press." *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). This case presents the opposite; the fair report privilege stimulates these constitutional freedoms.

B. The Fair Report Privilege, Upon Which The Judgment Below Is Based, Is A Widely Recognized Means Of Protecting Fair And Accurate Reports Of Judicial Proceedings And Does Not Conflict With Decisions Of This Court, Other State Courts Of Last Resort, Or United States Courts Of Appeals.

In this case, the Court of Appeals of Maryland described the important policy reasons behind the fair report privilege:

> Any one of three theories may serve as a rationale for granting a privilege to such reports of events in

[5] In reaching this decision the Court of Appeals also recognized that the fair report privilege is not limited to the press, but extends to any person who reports on judicial proceedings. Pet. App. 96A.

> court: 1) the agency rationale, by which the reporter acts as agent for an otherwise preoccupied public which could, if it possessed the time, energy or inclination, attend the proceedings; 2) the public supervision rationale, by which the reporter provides to the larger community data it needs to monitor government institutions; 3) or the public information rationale, by which the reporter provides information affecting the greater public welfare. . . . While each of these theories might arguably serve in this case, the agency rationale is clearly applicable. Rosenberg acted as a conduit between the courtroom and the world at large. He recounted events at a judicial hearing, entirely open to the public, that any members of the community might have seen and heard for themselves.

Pet. App. 94A-96A; *see generally* David A. Elder, *The Fair Report Privilege*, §§ 1.00A, 1.01 (1988).

As in Maryland, the fair report privilege is recognized by many states and leading commentators as a means of assuring that fair and accurate reports of judicial (or any other government) proceedings are protected. *See* Elder, *supra*, § 3.01 (presenting state-by-state analysis of fair report privilege with case citations); *see also* 2 Harper, *supra*, § 5.24; W. Page Keeton, *et al.*, *Prosser and Keeton On The Law of Torts* § 115, at 836 (5th ed. 1984); Restatement (Second) of Torts § 611 (1977).[6]

Moreover, the public policies behind the fair report privilege are consistent with analogous decisions of this Court. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court stated that " '[a] trial is a public

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[6] Petitioner's apparent reliance on *Yerkie v. Post-Newsweek Stations, Mich., Inc.*, 470 F. Supp. 91 (D. Md. 1979) for the proposition that the fair report privilege is inapplicable to this case is misplaced. In *Yerkie*, the district court held that the privilege does not apply to out-of-court statements made by the parties, counsel or witnesses to a proceeding about evidence "expected to be given which have not yet been made a part of the judicial proceeding. . . ." 470 F. Supp. at 94. Here, Dr. Rosenberg's out-of-court statements reported the content of evidence already presented in a judicial proceeding.

event. What transpires in the court room is public property.'" 420 U.S. at 492 (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)). Accordingly, "'[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus, there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record . . . .'" *Id.* at 494 (citation omitted; ellipses in original); *see also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (declaring unconstitutional a law making it a crime to publish information regarding proceedings by state judicial review commission); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978) (stating that *Cox* reaffirmed right of the press to publish accurate information contained in public court records); *Oklahoma Publishing Co. v. District Ct.*, 430 U.S. 308 (1977) (striking down injunction prohibiting disclosure of information obtained in juvenile court); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment.").

In any event, it is clear that the fair report privilege rests on sound reasons of policy, and that invocation of the privilege is a determination that should be left to state law.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

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